

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

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SECRETARY OF STATE  
OF CALIFORNIA

In re: ) 1990 OAL Determination No. 5  
Request for Regulatory )  
Determination filed by ) [Docket No. 89-011]  
Legal Services of )  
Northern California con- ) March 6, 1990  
cerning the Department of )  
Social Services' Family ) Determination Pursuant to  
Support Division Letter ) Government Code Section  
No. 89-3 ("Title IV-D ) 11347.5; Title 1, California  
Program Case and Account ) Code of Regulations,  
Opening, Prioritization ) Chapter 1, Article 2  
and Closing Procedures") )  
\_\_\_\_\_ )

Determination by:

  
\_\_\_\_\_  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Debra M. Cornez, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether Department of Social Services' procedures, concerning the opening, prioritizing and closing of child support cases and accounts, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that these procedures are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED<sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether or not the procedures issued by the Department of Social Services' ("Department") in its Family Support Division ("FSD") Letter No. 89-3, concerning the opening, prioritizing and closing of child support cases and accounts are "regulations" required to be adopted pursuant to the Administrative Procedure Act.<sup>4</sup>

THE DECISION<sup>5, 6, 7, 8, 9</sup>

OAL finds that:

- (1) rules issued by the Department are specifically required by the Welfare and Institutions Code to be adopted pursuant to the Administrative Procedure Act ("APA");
- (2) the Department's procedures noted above are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) these procedures are not exempt from the requirements of the APA; and, therefore,
- (4) these procedures violate Government Code section 11347.5, subdivision (a).

R E A S O N S   F O R   D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

Following an executive branch reorganization in 1978, the Department of Social Services ("Department" or "DSS") was created to replace the Department of Benefit Payments. DSS is under the cabinet-level Health and Welfare Agency.<sup>10</sup> It is responsible for supervising the delivery of cash grants and social services to needy persons in California.<sup>11</sup>

In addition to the duties noted above, the Department is also responsible for administering the state plan for securing child and spousal support and determining paternity. Welfare and Institutions Code section 11475, subdivision (a), provides:

"(a) The department is hereby designated the single organizational unit whose duty it shall be to administer the state plan for securing child and spousal support and determining paternity. State plan functions shall be performed by other agencies as required by law, by delegation of the department, or by cooperative agreements."

Authority <sup>12</sup>

The Department has been granted general rulemaking authority by Welfare and Institutions Code section 11475, subdivision (b), which states in part:

"The director shall formulate, adopt, amend or repeal, in accordance with provisions of [Welf. & Inst. Code] Section 10554, regulations and general policies affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with law and necessary for the administration of the state plan for securing child and enforcing spousal support orders and determining paternity. . . ." [Emphasis added.]

Welfare and Institutions Code section 10554 specifically provides, in part, that:

"The director is the only person authorized to adopt regulations, orders, or standards of general application to implement, interpret, or make specific the law enforced by the department and such regulations, orders, and standards shall be adopted, amended, or repealed by the director in accordance with

the provisions of [the APA], provided that such regulations need not be printed in the California Administrative Code or California Administrative Register if they are included in the publications of the department [i.e., DSS Manual of Policies and Procedures]. . . ." <sup>13</sup> [Emphasis added.]

### Background

To facilitate understanding of the issues presented in this Determination, we set forth the following facts and relevant state and federal law.

Congress enacted the Aid to Families with Dependent Children ("AFDC" or "Title IV-A") program <sup>14</sup> of the Social Security Act to provide financial and medical assistance to needy families. Section 602(a)(27) of the AFDC program provides:

"(a) A State plan for aid and services to needy families with children must--

. . . .

(27) provide that the State has in effect a plan approved under part D of this subchapter [IV] and operates a child support program in substantial compliance with such plan; . . ." <sup>15</sup>

Section 602(a)(27) is referring to Title IV, Part D, sections 651 through 669, of the Social Security Act, known as the Child Support Enforcement Act ("Title IV-D"), enacted by Congress in 1975. <sup>16</sup> The AFDC program and the Title IV-D Act provide grants to states which elect to participate in the AFDC program and provide child support collection services. California elected to participate in the AFDC program and enacted statutes implementing the AFDC program and Title IV-D, i.e., Welfare and Institutions Code sections 10600-10980 and 11200-11492.1. <sup>17</sup>

Title IV-D requires states to locate absent parents, establish paternity, obtain support orders and collect support payments. Title IV-D also requires states to develop a state plan which describes the nature and scope of its child support enforcement program ("IV-D program"). The states are authorized to delegate functions of the IV-D program to appropriate courts or law enforcement officials with whom a cooperative agreement has been entered into. <sup>18</sup>

In California, the Department has entered into a cooperative agreement with each county district attorney's office. Welfare and Institutions Code section 11475.1, subdivision (a), provides in part:

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"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations, enforcing spousal support orders established by a court of competent jurisdiction, and determining paternity in the case of a child born out of wedlock. . . ."

Section 11475.2 of the Welfare and Institutions Code states that the Department may impose sanctions on "any public agency, which is required by . . . cooperative agreement, to perform functions relating to the state plan for securing child and spousal support and determining paternity," if the Department determines the public agency "to be failing in a substantial manner to comply with any provision of the state plan . . . ."

The challenged rule in this proceeding is an addendum, titled "TITLE IV-D PROGRAM, CASE AND ACCOUNT OPENING, PRIORITIZATION AND CLOSING PROCEDURES, January 1989", to the cooperative agreements. It contains procedures and criteria to be used by the district attorney offices for opening, prioritizing and closing child support cases and accounts. The addendum was issued as Family Support Division Letter No. 89-3, dated January 18, 1989, and was addressed to "ALL DISTRICT ATTORNEYS" and "ALL TITLE IV-D ADMINISTRATORS."

On May 22, 1989, Legal Services of Northern California (the "Requester") filed a Request for Determination with OAL, contending that the procedures and criteria contained in the addendum meet the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore, should be adopted pursuant to the procedural requirements of the APA.

On December 8, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.<sup>19</sup>

On January 22, 1990, the Department filed a Response to the Request with OAL.<sup>20</sup> The Department summarized its position regarding the Request as follows:

"It is clear that the Department has a Federal mandate and State statutory authority to administer the Title IV-D program by means of cooperative agreements and delegation. The agreements delegate the responsibility for carrying out the child support enforcement program to the District Attorneys, who agree to enforce the Federal regulations and policies. The addendum in question is an amendment to the cooperative agreement, and conveys Federal regulations and the results of Federal audit recommendations to the District

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Attorneys. The Federal instructions thus conveyed apply directly to the County District Attorneys, and if the District Attorneys do not carry out the Federally mandated functions, Federal funds can be lost. Since the State Legislature has created a method of administration by delegation and cooperative agreement, and since the counties have agreed to carry out the Federal regulations, the method presents a legally acceptable alternative to promulgation of State regulations."<sup>21</sup> [Emphasis added.]

We will address the Department's argument that the challenged addendum is a "legally acceptable alternative to promulgation of State regulations" below, under the heading "II. ISSUES."

## II. ISSUES

The three main issues before us are:<sup>22</sup>

- (1) WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."<sup>23</sup> Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>24</sup>

In addition, Welfare and Institutions Code sections 10554 and 11475 (quoted above under "Authority") specifically require the Department's "regulations" to be adopted pursuant to the APA.

We are aware of no statutory exemption which would permit the Department to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

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In part, Government Code section 11342, subdivision (b), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in the key provision of Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>25</sup> In FSD Letter No. 89-3, the Department states the letter's purpose as "This letter transmits mandatory procedures to be used by Title IV-D Agencies throughout California to open,

prioritize and close [Title IV-D] cases and accounts." (Emphasis added.) There is no doubt that these procedures are standards of general application to be applied to all Title IV-D cases and accounts statewide.

Having established that the procedures are applied generally statewide, we now inquire whether the challenged procedures have been adopted by the Department to implement, interpret, or make specific the law enforced or administered by the Department, or to govern its procedures. The answer to this part of the inquiry is also "yes."

As stated above, the Department is the "single organizational unit whose duty it shall be to administer the state plan for securing child and spousal support and determining paternity."<sup>26</sup> The Director of the Department

"shall formulate, adopt, amend or repeal, in accordance with provisions of [the APA], regulations and general policies affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with law and necessary for the administration of the state plan for securing child and enforcing spousal support orders and determining paternity."<sup>27</sup> [Emphasis added.]

Clearly, the Department issued these policies to implement, interpret or make specific the law it administers and enforces--the state IV-D program.

Federal regulation, 45 CFR section 302.34 (a), requires that "the State plan shall provide that the State will enter into written agreements for cooperative arrangements with appropriate courts and law enforcement officials. . . ." Welfare and Institutions Code section 11475, subdivision (a), requires that the "State plan functions shall be performed by other agencies as required by law, by delegation of the department, or by cooperative agreements." (Emphasis added.) In this proceeding, the challenged procedures were issued by the Department to local IV-D agencies as an addendum to cooperative agreements already entered into with the local agencies. According to the FSD Letter No. 89-3 accompanying the addendum, these procedures are "mandatory" in performing certain functions of the IV-D program--opening, prioritizing and closing IV-D child support cases and accounts.

In its Response, the Department acknowledges that "the addendum does impose requirements on the counties as to the handling of child support cases," but argues that the challenged procedures are part of "the delegation of responsibility for carrying out the federal requirements, by means of the plan of cooperation, [which] is authorized and mandated by Federal and State law."<sup>28</sup> The fact that this



method of delegation of IV-D program functions, i.e., cooperative agreements, is authorized and mandated by federal and state law does not alleviate the Department's statutory obligation of complying with the APA. It does not mean that the Department may circumvent APA requirements by issuing "regulatory" material under the guise of addendums to cooperative agreements. In fact, Welfare and Institutions Code section 11475, subdivision (b), makes it clear that the Legislature intended Department regulations and general policies "necessary for the administration of the state plan for securing child and enforcing spousal support orders and determining paternity" be adopted pursuant to the APA. The California Legislature recognized the fact that federal IV-D regulations must be codified in state statute or regulation before federal IV-D regulations could be applied and enforced.

The following is an example of the "regulatory" provisions contained in the addendum:

"Prioritization: Each Title IV-D agency may, at its option and with [Department] approval, implement the prioritization process described in these procedures. Prioritization will allow low priority cases to be worked at least once annually. If additional information is received, the case must be processed sooner or more often, as necessary.

"The prioritization requirements provide three criteria for assigning a case to low priority status: the absent parent is temporarily unable to pay; the absent parent's location is unknown; and the absent parent temporarily resides in a non-URESA jurisdiction. . . .

"At the time a case is assigned to low priority status, the IV-D applicant/recipient must be notified and advised that new information may result in a higher priority for the case . . . . Cases will remain in low priority status for a maximum of three years, at which time they will be closed (unless they were closed or reassigned to a higher priority in the interim). Low priority cases are reported as open for all statistical, financial and audit reports.

"A review of each low priority case must be conducted at least once annually. . . ."29

The addendum also contains six pages of criteria for closing a case.<sup>30</sup> For example, if the case has no existing support order, the absent parent is unable to pay, and the case status is AFDC, FC (foster care) or Non-AFDC, then the case is eligible for closure if

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"-The absent parent has no known source of income assets in excess of the minimum needed under State law to establish an obligation and all evidence indicates that this is a permanent situation, i.e., the absent parent is a habitual criminal, mentally incompetent, disabled, etc.; OR

"-The case has been assigned to low priority status for the preceding three-year period, with no change in priority during that time."

WE CONCLUDE therefore that the Department's procedures set forth in FSD Letter No. 89-3, concerning the opening, prioritizing and closing of child support cases and accounts are "regulations" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute. Additionally, rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>31</sup>

Express statutory exemption from APA

The Department argues that the method of administering the Title IV-D program by means of cooperative agreements, and addendums thereto, "presents a legally acceptable alternative to promulgation of State regulations." We cannot agree with this argument for the following reasons.

We are not aware of any state or federal law that provides for this "cooperative agreement" exception to California APA procedural requirements, nor did the Department provide OAL with any legal authority for this argument. The fact that federal law allows a state, which elects to participate in a federal grant program, to delegate program functions through cooperative agreements with local agencies, does not mean that the state agency is no longer required to comply with state APA procedural requirements.<sup>32</sup>

The APA contains no provisions for nonstatutory exceptions. Government Code section 11346 provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative

power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

The APA applies "to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted . . . ." (Emphasis added.) In this proceeding, the Department is exercising its quasi-legislative power to implement and administer the state plan for securing and enforcing child support orders and determining paternity as directed by Welfare and Institutions Code section 11475. Section 11475 also specifically states that the Department's quasi-legislative actions (the formulation, adoption, amendment or repeal of regulations and general policies) be conducted "in accordance with provisions of [the APA]."

An example of a "statutory exemption" from APA requirements is Labor Code section 1185, which concerns the Industrial Welfare Commission. Section 1185 provides:

"The orders of the commission fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code [the APA]." [Emphasis added.]

#### Contractual exemption from APA

While there is some authority for the proposition that contractual provisions previously agreed to by a party may not later be challenged by that party as an underground regulation,<sup>33</sup> the Requester challenging the procedures is not a party to the cooperative agreements or the addendum. The cooperative agreements were made between the Department and the individual county district attorney's offices.

Therefore, assuming arguendo that there is a viable "contract exception" to the APA requirements, that exception does not apply here because the party filing the Request for Determination had not previously agreed to the addendum at issue, or the cooperative agreement (which is not at issue in this determination proceeding).

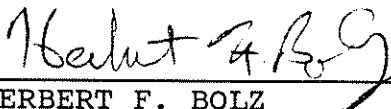
We conclude, therefore, that none of the available APA exceptions apply to the challenged addendum.

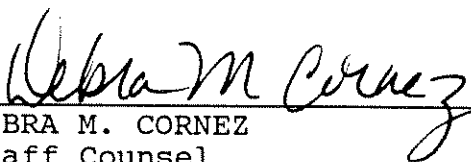
III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) rules issued by the Department are specifically required by the Welfare and Institutions Code to be adopted pursuant to the Administrative Procedure Act ("APA");
- (2) the challenged procedures are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) the challenged procedures are not exempt from the requirements of the APA; and, therefore,
- (4) the challenged procedures violate Government Code section 11347.5, subdivision (a).

DATE: March 6, 1990

  
HERBERT F. BOLZ  
Coordinating Attorney

  
DEBRA M. CORNEZ  
Staff Counsel

Rulemaking and Regulatory  
Determinations Unit<sup>34</sup>  
Office of Administrative Law  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
(916) 323-6225, ATSS 8-473-6225  
Telecopier No. (916) 323-6826

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1. This Request for Determination was filed by Legal Services of Northern California, Brian Paddock, Regional Counsel, Executive Office, 515 12th Street, Sacramento, CA 95814, (916) 444-6760. The Department of Social Services was represented by Lonnie M. Carlson, Deputy Director/Chief Counsel, Legal Division, 744 "P" Street, Sacramento, CA 95814, (916) 323-4701.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination as filed with the Secretary of State and as distributed in typewritten format is "125" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

(1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved), the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."  
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342,

unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
1. File its determination upon issuance with the Secretary of State.
  2. Make its determination known to the agency, the Governor, and the Legislature.
  3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
  4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings. These five reasons are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990. See also Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-425 (interpretation of statute by agency charged with its enforcement is entitled to great weight).

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted concerning this Request for Determination.

The Board's Response to the Request for Determination was received by OAL on January 22, 1990, and was considered in rendering this determination.



7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

10. Welfare and Institutions Code section 10600.1.
11. Id., section 10600.
12. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

13. On January 1, 1988, the "California Administrative Code" was renamed the "California Code of Regulations" (CCR), and the "California Administrative Notice Register" was renamed the "California Regulatory Notice Register."
14. Title IV, part A, of the Social Security Act (42 U.S.C. sections 601 - 617) (Aug. 14, 1935, c. 531, Title IV, sec. 401, 49 Stat. 627).
15. 42 U.S.C. section 602(a)(27).
16. 42 U.S.C. sections 651 - 669.
17. See Morris v. Cohen (1984) 149 Cal.App.3d 507, 511, 196 Cal.Rptr. 834, 836.
18. See 42 U.S.C. section 654(7) and 45 CFR section 302.34.
19. California Regulatory Notice Register 89, No. 49-Z, December 18, 1989, pp. 3302-3303.

20. The Department has 45 days from the date the Request for Determination is published in the California Regulatory Notice Register to submit a Response to the Request. (Tit. 1, CCR, sec. 125(b).) In this determination proceeding, the Department's Response deadline was January 22, 1990.
21. Department's Response, pp. 6-7.
22. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
23. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
24. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
25. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
26. Welfare and Institutions Code section 11475, subdivision (a).
27. Id., subdivision (b).
28. Department's Response, p. 2.

29. See the challenged addendum, "TITLE IV-D PROGRAM, CASE AND ACCOUNT OPENING, PRIORITIZATION AND CLOSING PROCEDURES, January 1989," p. 3.

30. Id., pp. 11-16.

31. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in the

application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

32. The Department further argues that "if the District Attorneys do not carry out the Federally mandated functions, Federal funds can be lost." (Department's Response, p. 6)
33. See City of San Joaquin, Roth and Nader cases cited above in note 22.
34. We wish to acknowledge the substantial contribution of Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.